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Sentence

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

11 Cr. 12 (RMB)

5 JOHN BRANCACCIO,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 September 20, 2012  
10:00 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
17 Southern District of New York

DANIEL CHUNG

17 Assistant United States Attorney

18 ROBERT RAY

19 MADELON GAUTHIER

Attorneys for Defendant

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(Case called)

THE COURT: So, as you know, we are on this morning for sentencing. And the rules of sentencing changed over the years as a result of Supreme Court decisions and decisions of the Second Circuit Court of Appeals as well, the upshot being that the United States Sentencing Guidelines are no longer mandatory and, instead, sentencing courts are directed to look at a statute that's referred to as 18 United States Code Section 3553(a), which I have done, incidentally, prior to coming on the bench today. And those factors include the nature and the circumstances of the offense, the history and characteristics of Mr. Brancaccio and the need for the sentence to accomplish certain objectives, which include reflecting the seriousness of the offense. The offense here, as we will get to in a moment, I'll describe it, but it is a serious one. We also need to promote respect for the law, to provide a just punishment, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of Mr. Brancaccio, to provide him with needed educational or vocational training, medical care or other correctional treatment in the most effective manner, which is also critically important here in light of his extensive history of abusing drugs.

We look at the kinds of sentences available, the kinds of sentence and the sentencing range established in the sentencing guidelines, even though those are no longer

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1 mandatory. We look at any policy statements issued by the  
2 sentencing commission, which may apply. We seek to avoid  
3 unwarranted sentence disparities among similarly-situated  
4 defendants, and we also, in an appropriate case, I don't think  
5 this is one of those, seek to provide or need to provide for  
6 restitution.

7 Just as a heads-up, as you're contemplating your  
8 arguments or presentations, and I am going to give you the  
9 detailed analysis in a second, but I do find, first of all, and  
10 we always with the guidelines analysis that the applicable  
11 guideline range is appropriately stated as 210 to 240 months  
12 based on an offense level of 32 and a criminal history category  
13 of VI. Actually, the range would go to 262 months, but there  
14 is a statutory maximum, so 240 is the statutory maximum. So  
15 that range is also the range that is currently reflected in the  
16 plea agreement.

17 Just by way of background, there was, prior to  
18 reaching this plea agreement, if I remember correctly, there  
19 was another plea agreement which had the range at 188 to 235  
20 months. Is that the right number?

21 MR. CHUNG: That's right, your Honor.

22 MR. RAY: Yes, it is, your Honor.

23 THE COURT: And that prior plea agreement did not  
24 allow the parties to argue outside the range. The new plea  
25 agreement or the current applicable plea agreement sets the

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1 range at 210 to 240 months but does allow the defense to argue  
2 for a sentence lower, for example, than 210 months.

3 MR. RAY: That's also right.

4 THE COURT: And also has a heads-up, what my plan is,  
5 I meant to say this, I do think that what's called a  
6 nonguidelines sentence is appropriate here. And I think it's  
7 appropriate, as you'll see, based on all of the factors at  
8 18 -- or several at least of the factors at 18 United States  
9 Code Section 3553(a), not any one in particular. There are a  
10 series of issues which, in my mind, warrant a below guidelines  
11 sentence which I will come to.

12 There is disagreement between the defense and the  
13 government as to whether some of Mr. Brancaccio's prior state  
14 sentences should be taken into consideration by the Court in  
15 support of accrediting him with prior time served. Counsel for  
16 the defense has indicated that a hearing is not necessary to  
17 resolve this issue, and I assume the government feels the same  
18 way. I am not sure. Personally I think that there is enough  
19 information here to resolve the case for sentencing without a  
20 hearing, but I don't know what your view is.

21 MR. CHUNG: Your Honor, the government's position is  
22 that it disagrees with the defendant's account of the relevant  
23 facts here, but ultimately that that factual dispute really  
24 doesn't matter for purposes of the sentencing.

25 THE COURT: If you do the 18 U.S.C. 3553(a) analysis

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1 here are some of the salient facts in my judgment.

2 First of all, Mr. Brancaccio pled guilty on April 26,  
3 2012 to Count Two in the indictment, which is a racketeering  
4 count, and specifically he acknowledged the following  
5 racketeering acts: Cocaine trafficking, marijuana trafficking,  
6 extortion conspiracy, and operating an illegal gambling  
7 business or sports betting. And he pled guilty pursuant to a  
8 plea agreement which is dated April 25, 2012.

9 As I said before, in that agreement there is a  
10 stipulated offense level of 32, criminal history category of  
11 VI, and guideline range of 210 to 240 months. And the plea  
12 agreement further provides, among other things, that the  
13 cocaine trafficking involved ten kilograms, marijuana  
14 trafficking involved 999 kilograms. Mr. Brancaccio possessed a  
15 firearm in connection with the cocaine trafficking. The  
16 extortionate conduct involved the brandishing and possession of  
17 a firearm. The extortionate conduct involved more than \$50,000  
18 but less than \$250,000. Mr. Brancaccio committed what we will  
19 call the instant offense while he was on parole.

20 As I noted before, this plea agreement also provided  
21 that either party may seek a sentence outside the stipulated  
22 guideline range pursuant to the factors to be considered at 18  
23 United States Code Section 3553(a), and that was a change over  
24 the prior proposed plea agreement, and the defense has made  
25 such a proposal. They have sought a sentence outside the

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1 stipulated guideline range.

2 Just by way of historical background, I wanted to  
3 reference some of the statements that were made and questions  
4 asked by me and answers by the defense during the plea  
5 allocution. And at that time Mr. Brancaccio stated, among  
6 other things, that he understood that any part that I had in  
7 narcotics trafficking or sports betting, no matter how small or  
8 large it may be, it is relevant to this indictment and I  
9 understand that I am guilty of that, your Honor.

10 And when asked by me, by the Court, So did you engage  
11 in cocaine trafficking, he replied, Yes.

12 When asked by me, Did you engage in marijuana  
13 trafficking, he replied, Yes.

14 When asked by me, Did you engage in extortion  
15 conspiracy, he replied, Yes.

16 And when asked by me whether he engaged in illegal  
17 gambling, he also replied yes. And he also stated that he  
18 understood that those activities in some way furthered the  
19 enterprise, talking about a RICO enterprise.

20 When asked by me, Did you engage in these activities  
21 during the period the late 1980s to in or about 2011, he said  
22 Yes, from the late 1980s up to the present time, other than the  
23 time I spent in prison. That was his response.

24 I also asked, Did these activities occur in part in  
25 the Southern District of New York, which includes Manhattan,

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1 among other places, and the Bronx, and he said, Yes.

2 I asked him, Did he engage in those racketeering  
3 activities with other persons described in the indictment as  
4 members of the Gambino crime family? He answered yes.

5 And I asked if he knew those activities were illegal,  
6 and he answered, Yes, he did.

7 And I also asked: And you engaged in these  
8 racketeering activities through commission, that is to say, by  
9 engaging in the acts which I referred to a few minutes ago of  
10 cocaine trafficking, marijuana trafficking, extortion  
11 conspiracy, and operating an illegal gambling business, is that  
12 right? And he said, Yes.

13 And then the government posed a question which they  
14 asked me to ask and I said, So what the government is asking  
15 me, the Court, to ask you, Mr. Brancaccio, which I will do, is  
16 whether you understand that by extortion conspiracy is meant  
17 the receipt of money from an individual by threat or actual  
18 force, and he said, Yes.

19 You can look at the transcript for other question and  
20 answer.

21 In the defense submissions dated July 9, July 24, and  
22 August 29, 2012, the defense requested that the sentence be  
23 within the range of 134 to 164 months and in fact that it be at  
24 the bottom of such range, quote, through a substantial  
25 sentencing variance taking into account the unusual

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1 circumstances of Mr. Brancaccio's stipulated plea agreement,  
2 his criminal history, his status as a career offender. That  
3 status is also noted in the presentence investigation report,  
4 and the time previously served on a prior state -- I think the  
5 defense was referring to certain marijuana and assault  
6 convictions, or conduct that is within the ambit of the charge  
7 of RICO enterprise to which he pled guilty.

8 The defense also argues that Mr. Brancaccio's assault  
9 and the other predicate racketeering acts to which he pled  
10 guilty are all in furtherance of the jointly undertaken  
11 criminal activity and for relevant conduct purposes it is  
12 immaterial whether the act was charged as part of the  
13 substantive RICO count or as a conspiracy.

14 Defense counsel also notes that while Mr. Brancaccio  
15 concededly has a more serious criminal record than that of his  
16 codefendants, the fact that he will be sentenced even under his  
17 own recommendation to more time than a capo in the Gambino  
18 enterprise and the head of a crew speaks volumes as to why a  
19 sentencing variance is necessary and appropriate in order to  
20 fashion a fair and just sentence consistent with 18 U.S.C.  
21 Section 3553(a) that's found in the August 29, 2012 submission  
22 at page 12.

23 In its submission filed July 13, 2012, the government  
24 argues that the defendant should be sentenced within the  
25 stipulated guideline range of 210 to 240 months. The



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1 government also states that with respect to Mr. Brancaccio's  
2 prior drug convictions, the government agrees that the Court  
3 may consider those sentences as related to the instant offense.  
4 Brancaccio has been convicted before this Court of dealing  
5 cocaine and marijuana over his many years as a Gambino family  
6 associate, and the government agrees that his prior drug  
7 dealing was similarly related to the Gambino family. Yet the  
8 government also contends that to the extent the Court does give  
9 Mr. Brancaccio some credit for time served in his prior drug  
10 sentences, and the government believes that benefit should only  
11 be a few months, certainly less than 20 months, then that  
12 should be a basis not to sentence Brancaccio below the bottom  
13 of the guideline range but rather sentence him below the high  
14 end of that range.

15 So I think what the government is saying is if there  
16 is any reduction based on the marijuana offenses, it should be  
17 20 months or less subtracted from 240 rather than from 210. Is  
18 that your position?

19 MR. CHUNG: That's correct, your Honor.

20 THE COURT: In its submission dated July 30, 2012, the  
21 government states that the defendant has not provided the Court  
22 with an accurate factual record to support his claim that the  
23 1993 assault is related to the crimes of conviction here.  
24 Additionally, the government states that even if the assault  
25 were related to the Gambino family, defendant is not entitled

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1 to a sentencing reduction here because he has not pled to any  
2 actual crime here that relates to the assault.

3 This is the government still arguing this. It is  
4 crucial to note that Brancaccio has pled guilty here only to  
5 the substantive racketeering charge, Count Two, and not to the  
6 broadly-framed racketeering conspiracy charged in Count One.  
7 That is quite correct as a legal matter. Mr. Brancaccio did  
8 not plead to Count One of the conspiracy but rather to  
9 substantive racketeering as set forth in Count Two.

10 So there is one provision of the sentencing guidelines  
11 that one needs to refer to, and that is United States  
12 Sentencing Guidelines 2E1.1, application note 4 states that:  
13 Certain conduct may be charged in the count of conviction as  
14 part of a pattern of racketeering activity, even though the  
15 defendant has previously been sentenced for that conduct.  
16 Where such previously-imposed sentence results from a  
17 conviction prior to the last overt act of the instant sentence,  
18 treat as a prior sentence under Section 4A1.2(a)(1) and not as  
19 part of the instant offense. This treatment is designed to  
20 produce a result consistent with the distinction between the  
21 instant offense and the criminal history found throughout the  
22 guidelines.

23 I think the point of this section is, and I think  
24 that's how the 210 to 240 came about, is that those prior  
25 convictions and sentences are treated here as criminal history

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1 and not necessarily as part of the instant offense. Is that  
2 the way you got to 210 to 240?

3 MR. CHUNG: That's correct, your Honor.

4 MR. RAY: I think that's right. But the flip side of  
5 it is that they could have been, except for the operation of  
6 this application note. Of course, as we point out in our  
7 further sentencing submissions, at least the guidelines  
8 contemplate in a pre-Booker world that there are situations  
9 where that may produce what is referred to as an anomalous  
10 result which otherwise may constitute grounds for a downward  
11 departure. We are obviously not arguing for that here because,  
12 one, we are precluded from doing so under the plea agreement.  
13 Because also now we are in a post-Booker world, our view, and I  
14 think the Court accepts this approach, is that that can be  
15 dealt with by way of the 3553(a) sentencing factors.

16 THE COURT: Which is my intention, as I indicated.

17 MR. RAY: Thank you.

18 THE COURT: I don't think we need to reach the  
19 conclusion, as I say, anomalous or not, in the sense that  
20 counsel has just I think accurately and succinctly argued and  
21 based on the remarks that I made earlier on.

22 There is another provision that one should look at,  
23 which is United States Sentencing Guidelines 3D1.4(c). And it  
24 notes that when a less serious offense is grouped and  
25 disregarded, as is true here, it may provide a reason for

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1 sentencing at the higher end of the sentencing range for the  
2 applicable offense level. And the reference is United States  
3 Sentencing Guidelines 3D1.4(c). And I'm noting further that in  
4 this case Mr. Brancaccio received no increase for the  
5 racketeering act of operating an illegal gambling business or  
6 sports betting. So that's why I'm referencing this guidelines  
7 provision.

8 Further analysis under 18 U.S.C. Section 3553(a)  
9 yields the following conclusions: Mr. Brancaccio is 45. He  
10 has one child who is 11 years of age. He explains that he has  
11 a GED. He also clearly brings to my attention that he has a  
12 long-standing substance abuse history and problem involving  
13 marijuana, cocaine, Xanax, and alcohol.

14 According to the presentence report, when  
15 Mr. Brancaccio was 12 he was sent to live with his father. His  
16 parents had separated, because he was already using drugs and  
17 not attending school. After a period of approximately four  
18 months he went to live with his uncle and by the age of 14 he  
19 was returned to live with his mother.

20 According to the presentence report, further,  
21 Mr. Brancaccio abused alcohol since the age of eight until the  
22 time of his arrest. He smoked marijuana, it seems, daily from  
23 the age of 10 to the time of his arrest. He took Xanax daily  
24 from the age of 25 until time of his arrest. And he snorted  
25 cocaine socially at least three times per month from the age of

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1 22 to 43. So he has a very substantial drug history which is  
2 also going to factor into my nonguidelines sentence.

3 He acknowledges his extensive history of substance  
4 abuse. He also reveals that he participated in several  
5 different drug programs while in prison and while out of  
6 custody. He also has an extensive prior criminal history, and  
7 that includes convictions for attempted sale of marijuana in  
8 the fourth degree, criminal sale of marijuana in the fourth  
9 degree, disorderly conduct, in some instances more than one  
10 occasion, misdemeanor marijuana possession, assault with intent  
11 to cause injury with a weapon, criminal possession of marijuana  
12 in the fourth degree, criminal sale of a controlled substance  
13 in the fifth degree.

14 Just for your background and information, the  
15 presentence report includes three drug-related convictions  
16 between 1986 and 1990 that do not appear to have been reflected  
17 in the plea agreement.

18 He also, Mr. Brancaccio does acknowledge that he was  
19 on probation or parole at the time of the instant offenses. He  
20 also has some medical conditions, including diabetes, high  
21 blood pressure, and high cholesterol, and has experienced  
22 depression in the past.

23 He has also had employment in the past as a member of  
24 the Construction and General Building Laborers Local 779, and  
25 he's been employed by Odyssey Construction Corp., Plaza

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1 Construction Corp., JAK Construction, Northeast Underlayments,  
2 Pala Construction Corp., Iannelli Construction Company, Linear  
3 Contracting, Inc., Five Brothers, Inc., and Richter & Ratner  
4 Contracting Corp.

5 The defense says that while Mr. Brancaccio  
6 acknowledges that his status as a career offender and his prior  
7 record warrant an enhanced sentence, his relative possession as  
8 a mere associate of the enterprise should only carry so far to  
9 a sentence that is fair and reasonable and not greater than  
10 necessary to account for his relative role in the enterprise  
11 dating back over 25 years.

12 I'm including everything I'm referencing in the  
13 context as factors to be considered under 3553(a). I am  
14 including this one as well. This somewhat relates to the issue  
15 in the law called the parity, so to speak, of codefendants,  
16 that there shouldn't be a big disparity.

17 The defense also asked the Court to consider the fact  
18 that defendant had major substance abuse problems. We  
19 discussed those already and I am considering those as well,  
20 which he tried to correct. And as soon as completing a drug  
21 treatment program following release from an earlier  
22 imprisonment, he became a member of the Construction and  
23 General Building Laborers Local 1979. I just referred to that.  
24 And he worked legitimate construction jobs from 2008 to the  
25 time of his arrest.

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1           The government argues that by contrast that the  
2 defendant has not been deterred by prior prison sentences. The  
3 government notes that this is the defendant's ninth criminal  
4 conviction and his third felony conviction. The government  
5 also states that when law enforcement agents entered  
6 Brancaccio's home to arrest him, they found the following: 80  
7 grams of cocaine, small quantities of marijuana, digital  
8 scales, a grinder, glassine bags, a Winchester 12-gauge  
9 shotgun, shotgun shells, a loaded .40 caliber Glock handgun,  
10 and a rubber-handled machete. According to defense counsel,  
11 most of these items were found in the bedroom of  
12 Mr. Brancaccio's brother, Marco, quote, admittedly the shotgun  
13 shells, handgun, and machete all belonged to Mr. Brancaccio.

14           Just by way of further background, it appears that to  
15 me, based on the submissions, that Mr. Brancaccio spent  
16 approximately 24 months in state custody on prior drug  
17 offenses. That is an offense from September 2005 for which he  
18 appears to have been in custody from March 2006 to June 2007,  
19 roughly 15 months, and also for a September 2002 criminal  
20 possession of marijuana in which he appears to have been in  
21 custody for approximately nine months.

22           The assault, the prior assault that the defense  
23 discusses, I think he was in custody for approximately 54  
24 months. You could correct me if I'm wrong, but I think that's  
25 approximately the number. The government says it isn't proven,

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1 but roughly I think that's about the right number.

2 MR. RAY: I think roughly that's right. We were still  
3 not entirely sure, but anywhere from 54 to 56 months on the one  
4 and then the 24 months on the other. We calculated the total  
5 at 77 at one point and 76. I don't think we are entirely sure  
6 down to the month, but we are in the right neighborhood, and I  
7 don't think for sentencing purposes it's going to make a  
8 material difference.

9 THE COURT: I agree with that.

10 I have also received and reviewed letters from  
11 Mr. Brancaccio, from his son, from his mother.

12 MR. RAY: Your Honor, may I just note, and I should do  
13 so now, that the defendant's mother is present in the courtroom  
14 behind me, as is his son and his son's mother.

15 THE COURT: They are certainly welcome and I have  
16 letters, as I say, family letters that I have received.

17 I also received a letter from his uncle or two  
18 letters, actually, who mentions that Mr. Brancaccio and his  
19 family would be welcome to live with him in Florida  
20 postincarceration, and a job may be in the offing, also, down  
21 the road there.

22 He also mentions that the system has failed  
23 Mr. Brancaccio as a child. I think one could debate that, but  
24 I understand what he means by that. It means that he had a  
25 difficult childhood and I think he really means that perhaps he



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1 means that someone didn't reach out to Mr. Brancaccio to help.

2 In his letter to the Court, which I received September  
3 13, 2012, Mr. Brancaccio states that he's not an associate of  
4 the Gambino family but he acknowledges that in the past he has  
5 had dealings with associates of the Gambino family. He also  
6 says that he is very sorry for what he has done. He only wants  
7 to take care of his family, become gainfully employed once  
8 again, and remain law abiding and live in peace. He asks the  
9 Court to sentence him to 120 months followed by 60 months of  
10 house arrest. And in a letter dated July 5, 2012, he advised  
11 me that he is trying to better himself as a person while  
12 incarcerated so that this cycle can be broken, and he cannot  
13 only be a better person but a better father to his son. The  
14 Court notes that in the presentence report he advised probation  
15 that he committed the instant offense for monetary gain.

16 As I say, I have considered all of this as factors  
17 under 18 United States Code Section 3553(a). We do have to  
18 reflect in this sentence the seriousness of the offense. We  
19 also have to reflect Mr. Brancaccio's history, personal  
20 history, both the criminal history but also the drug history  
21 and among the other factors that I've already mentioned. We  
22 have to promote respect for the law, provide a just punishment,  
23 afford adequate deterrence to criminal conduct. Deterrence  
24 historically has not seemed to work with Mr. Brancaccio, but I  
25 still think there are general and specific deterrence issues

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1 that we need to address. We have to protect the public from  
2 further crimes and provide him with the appropriate medical  
3 care and, in particular, therapeutic counseling and drug and  
4 alcohol treatment.

5 I've also reviewed the presentence investigation  
6 report, dated July 19, 2012, with the addendum and the  
7 sentencing recommendation contained therein, and also let's go  
8 over the correspondence again from Mr. Ray: July 9, July 24,  
9 two submissions dated August 29; from the government, July 13,  
10 July 30, and along with the letters from Mr. Brancaccio and his  
11 family members.

12 Did I miss anything? Was there anything else that you  
13 wanted me to consider that I didn't?

14 MR. CHUNG: No, your Honor. That's all.

15 MR. RAY: No, your Honor. I think that's it. We did  
16 obviously file objections to the presentence report that were  
17 in writing, and those objections were addressed in the final  
18 presentence report and your Honor has the benefit, I believe,  
19 both of what our objections are and also how the probation  
20 department responded to those objections, and I suppose the  
21 most significant one, of course, is that we make an argument  
22 with regard to the basis of what our sentencing position would  
23 be, which was a variance. And the probation department or  
24 probation office, as is their practice, has deferred to your  
25 Honor that particular issue. Other than that, no, that's the

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1 entirety of our sentencing submission.

2 THE COURT: Mr. Ray, have you had the opportunity to  
3 read and discuss the presentence investigation report along  
4 with the addendum and sentencing recommendation and these other  
5 sentencing submissions with Mr. Brancaccio?

6 MR. RAY: Yes, your Honor. And I would note probably  
7 more so than any other client that I have ever had. In other  
8 words, Mr. Brancaccio has been involved in that process both  
9 prior to the plea, subsequent to the plea, and all during the  
10 period of time from that point forward until today at every  
11 step of the way. So we have reviewed that presentence report  
12 in depth paragraph by paragraph. I have reviewed all of the  
13 things that he has submitted to your Honor. And he has  
14 reviewed that which I have submitted on his behalf to this  
15 Court by way of the arguments presented in support of our  
16 position for a sentencing variance.

17 THE COURT: Mr. Brancaccio, you went over those  
18 materials with your attorney, Mr. Ray, as he just described?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do either of you have remaining objections  
21 to the presentence report apart from those that are reflected  
22 in the presentence report?

23 MR. RAY: No, your Honor. I think, as you can  
24 probably tell, we have made a number of them, but I believe all  
25 of that has been aired out either within the confines of our

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1 objections specifically to the report and addressed, and also  
2 back and forth before your Honor in the sentencing submissions  
3 between the defendant and the government.

4 So, no, outside of that, there are no others.

5 THE COURT: Any further objections from you,  
6 Mr. Brancaccio?

7 THE DEFENDANT: No, sir.

8 THE COURT: How about from the government?

9 MR. CHUNG: None, your Honor.

10 THE COURT: I return the presentence report to  
11 probation, which is the common practice. And now I'm hoping to  
12 hear from Mr. Ray, Mr. Brancaccio, and Mr. Chung, if they wish  
13 to be heard.

14 MR. RAY: Your Honor, let me start, I think, with a  
15 few principles.

16 One, I want to address the last point your Honor made  
17 first. I was at yesterday's sentencing of Mr. Corozzo, which,  
18 as you know, is a sentencing that involved the conciliary of  
19 the Gambino organized crime family and he was sentenced  
20 ultimately by this Court to 63 months which, for reasons I will  
21 get into, has some bearing on this case.

22 As your Honor knows, when you start to make arguments  
23 about one particular factor under the sentencing guidelines,  
24 you are always subject to the argument in response, well,  
25 that's one factor, and your Honor has correctly pointed out

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1 that it is a totality of the circumstances approach, and we  
2 agree with that.

3 THE COURT: And the totality clearly with respect to  
4 Mr. Corozzo is a different totality than with respect to  
5 Mr. Brancaccio.

6 MR. RAY: Yes, even on that particular factor. The  
7 minute you start to argue the need to avoid unwarranted  
8 sentencing disparity among defendants with similar records who  
9 have been found guilty of similar conduct, you always run up  
10 against any time you try to make that argument, well, all  
11 right, that's fine, but do we have someone who has a similar  
12 record and how similar is that record? Have they been found  
13 guilty of similar conduct? How similar is that conduct? And  
14 of course, this provision not only applies with regard to  
15 defendants in a case, but, obviously, presumably with regard to  
16 sentences of defendants regarding similar conduct and similar  
17 records across the country.

18 THE COURT: I agree with that. I think that the other  
19 defendants in this case, certainly I'm aware of my other  
20 sentences for them, and I'm aware of the requirement to avoid  
21 unwarranted disparities as well. I have factored all of that  
22 in, I think, and will in today's sentence.

23 MR. RAY: We appreciate that and we have, as I think  
24 you have seen from our sentencing submissions, taken I think  
25 great pains to remind the Court of the other sentences in the

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1 case, not because they are directly relevant, but they are of  
2 some relevance. And they are particularly, as I think we have  
3 tried to suggest, and I think this is where I am going to now  
4 have an argument that I hope varies a little bit from our  
5 sentencing submissions, because there is no point in repeating  
6 what we have already said, you have that and I can tell by your  
7 Honor's preliminary comments that you have all of those things  
8 in mind. So there is no point in repeating them.

9 Let me say this. Look. The sentencing guidelines  
10 have a couple of principles involved that I think bear mention.  
11 The first is the following: Someone who is a career offender,  
12 and we acknowledge that he is, generally warrants, under a  
13 principle of the guidelines, a sentence at or near the  
14 statutory maximum. If the general principle applies, guess  
15 what, we have hit the guideline range by virtue of the  
16 stipulations, which we don't disagree with and we are not  
17 arguing against, that put this case at 210 to 240, capped at  
18 the statutory maximum. If this were just a straight simple  
19 case of trying to figure out where a career offender gets  
20 sentenced on the count of conviction, that's a general  
21 principle that applies and we have hit here.

22 But I think there are some things that need to be  
23 considered and I think your Honor already has recognized that  
24 they warrant consideration, as your Honor has agreed to do a  
25 variance from what otherwise would be the recommended guideline

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1 range. What are those other principles? And I think they are  
2 worth taking account of beyond what we have already argued.

3 The first is that RICO cases, under the guidelines,  
4 have a way of ratcheting conduct up in a hurry to very, very  
5 steep offense levels. I'll talk about Mr. Brancaccio's  
6 criminal history in a moment. Let's just deal with one thing  
7 at a time, the offense level calculation.

8 As a matter of plea negotiations, in a RICO case,  
9 given another aspect of the guidelines that's significant and  
10 has a significant effect on where you land, and that's relevant  
11 conduct. Mr. Brancaccio admittedly is responsible and  
12 accountable for not only what he actually did, but also for the  
13 conduct of others that is either reasonably foreseeable to him  
14 or part of the same course of conduct or common scheme or plan  
15 of what it is he did do.

16 And in that regard there is a limit to how much  
17 leverage a defendant has facing a prosecution as Mr. Brancaccio  
18 was of RICO conspiracy allegedly from the early 1980s to the  
19 present, plus there is no getting around it, so it should be  
20 acknowledged, the fact that guns were found in his home, and he  
21 was facing a consecutive seven-year mandatory term, in a RICO  
22 case, where he has to eat, so to speak, relevant conduct for  
23 the entire enterprise, we have the situation in this case where  
24 there was a stipulation for over ten kilos of cocaine.

25 Now, we are not having a Fatico hearing here and I am

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1 not here to suggest or contest that the government wouldn't be  
2 able to prove at a Fatico hearing that the Gambino organized  
3 crime family was involved in more than ten kilos of cocaine  
4 from the early 1980s to the present. It would be a ridiculous  
5 hearing for me to have. It wouldn't be much of a factual issue  
6 and frankly wouldn't help my client.

7           So, you know, one thing should be said.  
8 Mr. Brancaccio came before your Honor initially and rejected a  
9 188 to 235 month plea deal because it didn't allow him to make  
10 a variance argument. As a result, he ended up having to accept  
11 a ratcheting up of his relevant conduct, which the government  
12 certainly is free to do because they have the ability to prove  
13 that at a sentencing hearing. Not because that's what  
14 Mr. Brancaccio did, but because it was at least reasonably  
15 foreseeable to him as the result of his acknowledged  
16 participation in the affairs of the enterprise, that if  
17 somebody else did it, he is legally accountable for it. We  
18 don't have the leverage of saying, I'm sorry, government, we  
19 are rejecting that because you can't prove that.

20           And even if I could say, why are you doing this,  
21 because Mr. Brancaccio didn't do that himself, it's clear from  
22 the conduct here and his own criminal history that he is not a  
23 kilogram weight, wholesale distributor of narcotics for the  
24 mob. That is not this case. And he's accountable for those  
25 larger amounts because it is relevant conduct reasonably



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1 foreseeable to him as a result of his limited participation in  
2 that enterprise.

3 And I think that's a reason, and I think it is one  
4 that only 3553(a) can serve to correct of making the  
5 distinction between that which he's personally accountable for,  
6 and I think your Honor sees the record and his past history.  
7 What was he doing? He was using marijuana. He was using  
8 cocaine and abusing both drugs, those drugs, other drugs, and  
9 alcohol. And he was distributing at a retail level.  
10 Admittedly, those are distribution activities of those two  
11 narcotics, which form predicate acts in this enterprise, that  
12 he pleaded guilty to and acknowledged. But he was doing so in  
13 order to make money in order to feed that habit.

14 So to begin where your Honor ended, unlike in the  
15 Corozzo case, I've talked now about the fact that he's not a  
16 made member of the Gambino family. At best he's an associate,  
17 even by the government's acknowledgement. He doesn't have  
18 operational responsibility within the mob. He doesn't have a  
19 supervisory position. He's not a made member. He does have a  
20 history. But what does that history show? That history shows,  
21 I think, although the past is reflected based upon his record  
22 in your Honor's words, deterrence hasn't seemed to work, I  
23 think it's a safe bet to believe that at this point in his  
24 life, as a 45-year-old man with an 11-year-old son, the letters  
25 that have been submitted, the gainful employment that he has

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1 had in the most recent relevant past, and the fact that there  
2 are family members that I think now are finally prepared to  
3 step up and help him, that I think that when he's done --  
4 nobody is contending here, even by the defendant himself, that  
5 he's not going to get a sentence here that's less than 120  
6 months. But the fact remains that in this 22-defendant case,  
7 there are only going to be apparently three people and possibly  
8 four who are going to have sentences that are in excess of  
9 that. Now, he stands before the Court understanding that  
10 that's the sentence that's going to be imposed on him largely  
11 as a result of his prior criminal record. Of course, that's  
12 appropriate.

13 But the question is, in the distance between a 20-year  
14 statutory maximum and in the neighborhood of a ten-year  
15 sentence, where within those two pretty far disparate sentences  
16 is it appropriate to sentence Mr. Brancaccio? We submit that  
17 it is much closer or should be much closer to the ten-year term  
18 of imprisonment rather than the 20-year term of imprisonment.  
19 We get there through a number of different arguments that your  
20 Honor is going to take account of that are included within the  
21 factors, the principal one of which we have argued in the  
22 papers and I won't rehash it.

23 But it is this whole question of what credit should be  
24 given, if any, for his previous sentences that were served in  
25 connection with state cases that are arguably within the ambit

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1 of the conspiracy. The government seems to concede the point  
2 with regards to the narcotics trafficking activity, which is  
3 about approximately, as your Honor has indicated, about 24  
4 months of that, 77-month period of time, and seemed to contest  
5 it with regard to the other 50 something months relative to the  
6 prior assault conviction.

7 We have made the argument that that assault is not  
8 unrelated to or not of a piece far beyond that which he did  
9 acknowledge, which was the extortion aspect or predicate act.  
10 And indeed there are discussions both with regard to that  
11 extortion that was charged and also the assault that wasn't on  
12 the government's own wiretap recorded conversations that we  
13 have cited to and quoted from in our sentencing submissions.

14 THE COURT: I referred to those approximate time  
15 periods. I just want to caution that ultimately my sentence is  
16 not a mathematical sentence. You shouldn't try and read into  
17 it that, oh, he came down from the guideline range by X months  
18 because of X or Y. It's not X or Y. It's all of these  
19 factors. So it is all of 18 U.S.C. factors, my intention is,  
20 come up with the reduction below 210, but I don't think you can  
21 find mathematically how I arrive at a particular number. This  
22 is more art than science. As I say, looking into his history  
23 and looking at the criminal history and personal history, all  
24 the factors with respect to deterrence and the seriousness of  
25 the offense, what's happened in the past, I'm trying to put it

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1 all in the mix.

2 MR. RAY: I think you can tell from my argument that I  
3 have not tried to stick too precisely to specific requests  
4 about how much credit to be given. I think it is a window on  
5 trying to get at who is this defendant, what is his history,  
6 and what did he actually do in connection with the offense of  
7 conviction.

8 THE COURT: Right. I get it.

9 MR. RAY: Let me turn to that. You know, to  
10 paraphrase a famous argument in another context, the problem  
11 with the operation of the RICO guidelines is that if you add an  
12 offense level or two here and an offense level or two there and  
13 an offense level or two in another place, pretty soon you add  
14 up to a whole lot of time.

15 But let's look at some of those factors. You know,  
16 one of them is the operation of the multiple count rules. It's  
17 not just the narcotics trafficking activity. I made my  
18 arguments with regard to that. While he is accountable for  
19 relevant conduct of the activities of others, I think a more  
20 close examination of what Mr. Brancaccio actually did is  
21 warranted and provides grounds under the 3553(a) factors to  
22 take that into consideration, and I know your Honor will.

23 Second, with regard to the extortion conspiracy, there  
24 is an adjustment for two things that obviously have a material  
25 impact. One is that the amount of the debt involved was over

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1 \$50,000, which we had to concede was so because that's  
2 apparently in fact what it was. However, as we have pointed  
3 out, Mr. Brancaccio's role was in order to secure a compromise  
4 of that debt that was in the neighborhood of approximately  
5 \$35,000.

6 If you are talking about actually what it is that he  
7 did, we are stuck in this position that relevant conduct means  
8 we have to be accountable for the whole thing, but what was  
9 Mr. Brancaccio's involvement? It didn't warrant the bigger  
10 enhancement, frankly, because of the fact that he was involved  
11 in a compromise of that debt.

12 Second point, and it's reflected on the recordings,  
13 the government's position with regard to the use and  
14 brandishing of a weapon in connection with that extortion is  
15 based upon a recorded conversation not of Mr. Brancaccio but of  
16 apparently of somebody else, Mr. Labarca, who was talking to  
17 another person who was the cooperating witness in this case  
18 about a conversation that Labarca had with another person who  
19 apparently was present. Well, Mr. Labarca wasn't present and  
20 the person that he was speaking to wasn't present when it  
21 happened and I can tell you, from Mr. Brancaccio, that he  
22 acknowledges that he threatened this person. So threats of  
23 violence were used and he is being sentenced as a result of  
24 what happened. But he did not use a weapon.

25 Now, again, under relevant conduct principles, the

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1 fact that other people were involved in this extortion who may  
2 have done so is something, of course, that would be reasonably  
3 foreseeable to him as the result of the fact of his willingness  
4 to use threats of violence. But, again, there is an  
5 enhancement there for a weapon that he didn't use.

6 Again, what I'm asking your Honor to take into  
7 consideration is that the ratcheting up of these accumulated  
8 adjustments by virtue of your participation in an enterprise  
9 that stretches back to the early 1980s has a material effect.  
10 We are not contending that that effect shouldn't be given  
11 consideration, as I'm sure the government will argue. I'm just  
12 saying they need to place that in context. That's what I'm  
13 trying to do.

14 THE COURT: I get it.

15 MR. RAY: I think, further, now I will turn to his  
16 criminal record, there are aspects of the operation of a plea  
17 to a RICO enterprise that encompasses conduct over a period of  
18 25 years that has an effect on what's counted and what's not  
19 counted. I mean, one of the prior convictions that we are  
20 talking about is this 1994 conviction for assault which  
21 apparently occurred in '93. That's more than 18 years old.  
22 And the second one is a narcotics conviction in 2005, which, of  
23 course, is seven years old.

24 And one of the things that either by way of either the  
25 career offender calculation, which those two would include, but

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1 remember a career offender calculation on its own, without the  
2 enhancements that come as the result of relevant conduct for a  
3 narcotics trafficking, would have only resulted in a career  
4 offender sentence of 151 to 188 months.

5 And Mr. Brancaccio also has, which counts for criminal  
6 history points purposes, a 2002 criminal sale of marijuana  
7 conviction that resulted, as your Honor specified, in nine  
8 months of imprisonment. It was a possession case rather than a  
9 sale case since it was a misdemeanor. In any event, that 2002  
10 conviction is, of course, now ten years old.

11 So what I'm asking your Honor to reflect is, on the  
12 one hand, you can say that Mr. Brancaccio has a history of  
13 criminal activity, but largely, on the other hand, as a result  
14 of the fact that he has a drug problem, and then while it is a  
15 lengthy period of time, that lengthy period of time is being  
16 picked up and considered in a case because of the way in which  
17 the case is charged that encompasses an awful lot of conduct  
18 that has nothing to do with Mr. Brancaccio but is in fact an  
19 enterprise, i.e., the Gambino crime family that is charged back  
20 to the early 1980s, when my client was a teenager.

21 I think some perspective on the operation of the RICO  
22 guidelines or the sentencing guidelines in a RICO case is  
23 important because then I think you can very quickly see how all  
24 these little things come together to result in a sentence that  
25 is, in the way which we have argued it, excessive under the

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1 circumstances, we believe, and disproportionate.

2           There are many different ways to get at, okay, what  
3 does that mean and how far varied from 210 to 240 should your  
4 Honor go? I think the important point to know, and I think  
5 Mr. Brancaccio will speak to this directly, because this is  
6 more his province than mine, I think your Honor has to weigh  
7 this very important question about whether or not in attempting  
8 to arrive at an appropriate sentence and accounting for both  
9 specific and general deterrence what kind of future there is  
10 for Mr. Brancaccio, taking account what it is that he has done,  
11 what it is he has acknowledged, and what it is is in store for  
12 him in the future.

13           I think in this case, for as long as I have known him,  
14 which is back to November of last year, he has made a concerted  
15 effort to truly accept responsibility for that which he did.  
16 And when things varied from that, as your Honor saw, he was  
17 pretty adamant about not accepting anything further than that.  
18 Indeed, it went so far as an attempt to fire me and replace me,  
19 a successful attempt to reject the government's existing plea  
20 offer because it didn't allow for a variance argument.

21           On penalty of risk of going to trial, rejecting a  
22 global plea offer that potentially jeopardized the negotiated  
23 resolutions of some of his codefendants, and then, finally,  
24 after he had entered a plea, I think it's fair to say -- I  
25 guess I can say without violating the privilege he had to trust



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1 me that withdrawal of his guilty plea was not a good idea,  
2 something that I think was fair to say was difficult for him to  
3 accept. And that's not, by any means, an attempt to leverage  
4 your Honor into a sentence. That's not what I mean. What I'm  
5 saying --

6 THE COURT: I get it. I was there for all of those  
7 events.

8 MR. RAY: I am just trying to remind the Court of that  
9 because I know there has been a lot of proceedings and your  
10 Honor has a lot of defendants before you in this case, and I  
11 appreciate that.

12 Anyway, I think Mr. Brancaccio will speak to that in a  
13 moment as well. I just wanted to remind the Court of those  
14 things. Sometimes, not always, but many times it is true that  
15 when somebody screams pretty loudly about trying to communicate  
16 how far they are willing to go, but also how far they are not  
17 willing to go, when faced with something as serious as this,  
18 it's worth listening because often, in my experience, they have  
19 a point, and I think Mr. Brancaccio does have a point. I do  
20 think that a fair and proportionate and just sentence in this  
21 case, mindful of his relative role in the offense and  
22 understanding that he is accepting responsibility for an awful  
23 lot of relevant conduct, relevant offense conduct, that he  
24 wasn't personally responsible.

25 THE COURT: I got it. You've been over that.

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1 MR. RAY: We think, under those circumstances, and  
2 there are a number of ways to get at it, that a sentence far  
3 closer to a ten-year sentence is appropriate than the 20-year  
4 sentence.

5 THE COURT: Your submission, as I mentioned before,  
6 suggested a range of 134 to 164. I know Mr. Brancaccio has  
7 suggested a lower range.

8 MR. RAY: Yes.

9 THE COURT: I'm familiar with all of that. I think I  
10 reflected that earlier in today's proceeding.

11 MR. RAY: That 134 calculation, again, understanding  
12 that no one could be entirely precise here, was simply a  
13 reduction based upon crediting him for the approximately 76  
14 months of time he served on those previous state sentences.

15 THE COURT: I got it.

16 MR. RAY: That's it. Thank you.

17 THE COURT: Mr. Brancaccio, would you like to be  
18 heard?

19 THE DEFENDANT: Yes, sir, your Honor.

20 First, I'd like to say that I take full responsibility  
21 for the things that I have done, and I'm very sorry to the  
22 Court, to society, to my family. I can stand here and tell you  
23 that I've done more drugs ever than I ever sold, but who is to  
24 believe what I said. As the government said, my record speaks  
25 for itself. I was arrested for \$10 bags of marijuana, \$20 bags

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1 of cocaine, and a pound of marijuana. I'm guilty of the things  
2 I have done. But the amount of drugs I had to cop out to, to  
3 me, it's just outrageous. Like I said, I accept responsibility  
4 for the things that I have done. It's just hard to understand  
5 why I have to accept 210 months.

6 I've done everything I could to better myself while I  
7 was in prison here, and I am going to continue to do what I can  
8 do. Thank you.

9 THE COURT: I would say that the key to your future is  
10 what you do do. I think you have unresolved big issues  
11 involving a lifetime of drug and alcohol abuse. I don't know.  
12 I'm certain it's not easy, and you've been in programs before.  
13 But unless you take care of all of that and unless -- I think  
14 there are mental health issues that go along with that that  
15 also need to be addressed. Like I said, this is not a  
16 directive because I know how hard this is for people, but  
17 unless you get a hold of those issues in a really meaningful  
18 way, whether you do or you don't, your future success rides on  
19 that, in my opinion.

20 Mr. Chung.

21 MR. CHUNG: Your Honor, first I'd like to comment on  
22 defense counsel's characterization --

23 THE COURT: Just one other thought. This is a  
24 personal observation. It won't be helpful, in my opinion, to  
25 view yourself as the victim. One of the letters I think maybe

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1 from your uncle suggests -- I think it's from your uncle, I am  
2 not sure who said it, but it doesn't matter. It's very common,  
3 incidentally, in sentencing, that comes up. And it is true.  
4 Maybe you had a bad deal, so to speak, and historically tough  
5 time as a child. But the key to success to getting over this  
6 victimization. And it's also true I think with respect to your  
7 plea agreement and the guideline range. We all know how it  
8 came about to be 210 to 240, and it is. I think that's an  
9 accurate statement legally of what the guideline range should  
10 be. That's just off the cuff. I think you got to get beyond  
11 being a victim and figure out how you can go forward.

12 Mr. Chung.

13 MR. CHUNG: Your Honor, first I want to comment on  
14 defense counsel's characterization of the offense conduct here  
15 as it's encapsulated by the plea agreement.

16 With respect to the drug trafficking, your Honor, the  
17 defendant wasn't just a retail dealer who sold the dime bags on  
18 the street. Since the 1980s, since the beginning of his drug  
19 dealing career, yes, he did sell drugs on the street regularly,  
20 but he also dealt and assisted other associates and members of  
21 the Gambino organized crime family in Queens to distribute and  
22 to bring in large kilogram quantities of cocaine and marijuana.  
23 So while he may not have personally sold kilogram quantities of  
24 drugs, he was an integral part in assisting the Gambino  
25 organization's drug dealing activities. The same goes with

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1 respect to the extortion conspiracy, your Honor.

2 Our position, I think it's established by the very  
3 tape of Todd Labarca that Mr. Ray pointed to, is that the  
4 defendant in this particular extortion conspiracy in 2009 was  
5 the one who threatened the victim with the gun. He pointed the  
6 gun at the victim, not someone else. And that's the latest in  
7 a series of violent acts by the defendant, including that 1993  
8 shooting assault.

9 I believe we have to correct sort of the  
10 characterization of the defense conduct. He is an associate.  
11 He is not a made member of the Gambino organized crime family,  
12 but he is not some peripheral on-and-off player. He was  
13 integral to the operation, including as recently in 2009, that  
14 extortion conspiracy.

15 Now, with respect to the defendant's prior convictions  
16 for the 1993 assault and his prior drug convictions and how  
17 they figure into the 3553 analysis, the defendant sort of  
18 frames those convictions as mitigating factors, that they  
19 should somehow figure into a discount from the applicable  
20 guidelines range of 210 to 240 months. We believe, we submit  
21 to the contrary that they are aggravating factors.

22 He served about 52 to 54 months' imprisonment for that  
23 shooting assault in 1993. That very long sentence, obviously,  
24 did nothing to deter the defendant from committing future  
25 violent crimes as recently as 2009, pointing a firearm at the

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1 extortion victim. It did nothing to deter him from continuing  
2 his drug dealing to possessing a shotgun and another firearm  
3 and drugs, even at the time of his arrest.

4 With respect to his drug convictions, your Honor, some  
5 of those sentences were more substantial than others, but in  
6 the aggregate they did nothing to deter the defendant from  
7 continuing his drug dealing up to the day of his arrest, when  
8 he was caught with all kinds of drug paraphernalia, as well as  
9 a substantial quantity of cocaine and some bags of marijuana.

10 So rather than a mitigating factor, those prior  
11 substantial sentences by themselves and in the aggregate are  
12 aggravating factors as they apply to a number of 3553 action  
13 factors, most pointedly towards specific and general  
14 deterrence, because they have done nothing to deter him.

15 Second, with respect to the nature and circumstances  
16 of the offense, it's specifically that those past convictions  
17 basically inform what he's done more recently with respect to  
18 the extortion conspiracy in 2009, the recent drug dealing.  
19 They also go towards his personal background, your Honor. Your  
20 Honor mentioned that there are two sides to the personal  
21 background of 3553 factors, the defendant's criminal history as  
22 well as other parts of his background, including his substance  
23 abuse and his upbringing.

24 I think there is a third element to that personal  
25 background 3553(a) factor and that is rung throughout the

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1     sentencings in this case, and that is the defendant's lifelong  
2     commitment to crime and specifically to violent crime. We  
3     quoted from one of the tapes in our sentencing submission that  
4     most recently the defense was overheard on a tape speaking to a  
5     cooperating witness how he was disappointed, he was  
6     dissatisfied that made members of the mob with whom he was  
7     associated or paying up to weren't violent enough. They  
8     weren't violent enough. They weren't enforcing the mob's  
9     edicts or their power enough. That's a commitment to a life of  
10    crime and it's demonstrated by his history. I think he spent  
11    pretty much the majority, the overwhelming majority of his  
12    adult life serving some sort of criminal sentence, and he has  
13    demonstrated up to the time of his arrest. That's just a third  
14    prong of the personal background, your Honor.

15           So while your Honor has previewed for the parties that  
16    the Court intends to impose a nonguidelines sentence based on a  
17    number of factors, we believe that those very same factors  
18    militate in favor of a guidelines sentence.

19           THE COURT: I appreciate that.

20           I think.

21           MR. RAY: Your Honor, if I just may, and I will not be  
22    repetitive, I would ask your Honor to do a few things.

23           THE COURT: We have been so over this, but go ahead.  
24    I don't think -- whatever. Go ahead.

25           MR. RAY: I think --

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1 THE COURT: I get it. I get the record, counsel. I  
2 get your arguments. I've read everything. I know the  
3 government's position. I know Mr. Brancaccio's position. So  
4 some of it has been repetitive, but go ahead.

5 MR. RAY: I would ask your Honor to reject the  
6 statement that Mr. Brancaccio assisted others in distributing  
7 kilogram quantities of narcotics because I do not believe --

8 THE COURT: You know very well we are not having a  
9 hearing now. This is just oral argument of you and oral  
10 argument of counsel. I am not finding new facts because you  
11 both indicated we don't need to have a Fatico hearing.

12 MR. RAY: Fair enough.

13 THE COURT: Right?

14 MR. RAY: That is fair.

15 I would ask your Honor further to, as I argued,  
16 although it was still stated. You know, I appreciate there is  
17 not a Fatico hearing, but then the government stands up and  
18 then argues things that if I don't say something it's as if I  
19 conceded it. All I'm trying to do is make a record to say --

20 THE COURT: You don't concede it.

21 MR. RAY: If your Honor is going to rely on it.

22 THE COURT: I don't want to stop you from making your  
23 record. Tell us what you don't concede.

24 MR. RAY: The second one that I would ask your Honor  
25 not to rely on was the statement that Mr. Brancaccio threatened



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1 the victim with a gun. As I argued, he is admitting that he  
2 threatened the victim with bodily harm. He did not threaten  
3 him with a gun.

4 Third, while it is technically true that  
5 Mr. Brancaccio possessed, because it was his home, everything  
6 that was in the home, as we made the point, and, your Honor, I  
7 think, made the record, our position was that the drugs that  
8 were in the home were not Mr. Brancaccio's, but they were his  
9 brother's. A glib argument, well, he was possessing these  
10 drugs is factually not accurate and I need to say so. That's  
11 the third point.

12 On the characterization, I'll just leave it with this.  
13 Our position is contrary to the government's argument, which is  
14 what justifies a substantial variance. Mr. Brancaccio was a  
15 peripheral figure in this case. Thank you.

16 THE COURT: I am going to adopt the findings of fact  
17 in the presentence report, unless there are further objections  
18 from defense counsel.

19 MR. RAY: No, your Honor. There was a thing I did not  
20 mention. In fairness, I should have done it before. It was  
21 not in response to counsel for the government. But one of the  
22 enhancements is the fact that Mr. Brancaccio committed the  
23 instant offense while on a form of supervision, which was  
24 parole. I think it is consistent with my prior arguments, but  
25 just to note it here, remember, that's more of a technical

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1 distinction because of the unusual anomalous aspect of a RICO  
2 case.

3 THE COURT: But he acknowledged that he did.

4 MR. RAY: He does. It's true and the enhancement is  
5 appropriate. But the context is, of course, if the instant  
6 offense is all the way back to the '80s, the offense is  
7 committed continuously from the '80s to 2011. That's the  
8 point.

9 THE COURT: Any other further objections from you,  
10 Mr. Brancaccio?

11 THE DEFENDANT: No, sir.

12 THE COURT: How about from the government?

13 MR. CHUNG: None, your Honor.

14 THE COURT: Here I am going to preview the sentence  
15 and then I am going to impose the sentence.

16 The submissions have been both extensive and very  
17 professionally done both by counsel and Mr. Brancaccio and the  
18 letters as well.

19 I intend to impose a sentence of custody of 165  
20 months. The offense level is 32. The criminal history  
21 category is VI. The statutory maximum is 240 months. That's  
22 going to be followed by three years of -- by the way, I am  
23 going to make a recommendation that Mr. Brancaccio be in a  
24 facility where he can get both drug treatment and mental health  
25 treatment and that he get that treatment in such a facility.

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1 MR. RAY: Would your Honor recommend further, you note  
2 his family is here and present in the courtroom and that he has  
3 an 11-year-old son. Obviously, it would be helpful if the  
4 Bureau of Prisons could find their way in their discretion with  
5 a recommendation from your Honor that it be a facility near the  
6 New York City area.

7 THE COURT: I will make that recommendation as well.

8 MR. RAY: Thank you.

9 THE COURT: That is going to be followed by three  
10 years of supervised release subject to the mandatory conditions  
11 that he not commit another federal, state, or local crime and  
12 that he not illegally possess a controlled substance, that he  
13 not possess a firearm, dangerous weapon or destructive device,  
14 and that he refrain from any unlawful use of a controlled  
15 substance. He will be required to submit to one drug test  
16 within 15 days of placement on supervised release and at least  
17 two unscheduled drug tests thereafter as may be directed by the  
18 probation officer.

19 In addition, he is required to comply with what are  
20 called standard conditions 1 through 13, plus these, that he be  
21 supervised in his district of residence, that he report to  
22 probation within 48 hours of release from custody, that  
23 throughout the term of supervised release he participate in a  
24 program approved by the probation office for substance abuse  
25 and that program shall include testing to determine whether he

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1 has reverted to the use of drugs or alcohol.

2 He may be required to contribute to the cost of  
3 services rendered as by a copayment in an amount to be  
4 determined by the probation officer based on such factors as  
5 availability of third-party payment and ability to pay.

6 In addition, throughout the term of supervised  
7 release, he be required to participate in weekly therapeutic  
8 counseling supervised by a license therapist and that is to  
9 include one individual session per week and at least one group  
10 session per week. And that may also be subject to the  
11 requirement that he contribute to the cost of services rendered  
12 as by a copayment in an amount to be determined by the  
13 probation officer based on such factors as ability to pay and  
14 availability of third-party payment.

15 I do not intend to impose a fine because none is  
16 recommended in the materials from probation, nor do I intend to  
17 impose restitution. There does not appear a victim within the  
18 meaning of 18 United States Code Section 3663 or 3663(a). I do  
19 intend to impose a \$100 special assessment which is mandatory  
20 and due immediately under 18 U.S.C. Section 3013.

21 Briefly, the reasons for the sentence, the offense  
22 level is 32, the criminal history category is VI. The  
23 guideline range would be 210 to 262, but because of the  
24 statutory maximum it's 210 to 240 months. And for the reasons  
25 I stated before, I believe that this sentence is appropriate,

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1 given all the factors at 18 United States Code Section 3553(a),  
2 and I don't feel one can or should parse any particular factor.  
3 It's all of those factors, as I have been trying to explain  
4 here this morning, that go into this sentence. So there is no  
5 mathematical way precisely to arrive at this sentence. But I  
6 do believe that the sentence is important, given the nature and  
7 circumstances of the offense, the history and characteristics  
8 of the defendant, the need to reflect the seriousness of the  
9 offense, to promote respect for the law, to provide a just  
10 punishment, to afford adequate deterrence to criminal conduct,  
11 to protect the public and to provide Mr. Brancaccio with needed  
12 educational and vocational training and, in particular, as I've  
13 outlined, medical care or other correctional treatment in the  
14 most effective manner.

15 Unless counsel has anything additional to add, that's  
16 the sentence I am going to impose.

17 MR. RAY: I don't think so. I believe there are open  
18 counts because of the fact --

19 THE COURT: We will get to that.

20 MR. RAY: Thank you.

21 THE COURT: Mr. Brancaccio, anything you want to add  
22 before I impose the sentence?

23 THE DEFENDANT: Your Honor, I take responsibility for  
24 what I did, but I just feel it's not fair and just. 14 years?  
25 What can I say?

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1 THE COURT: Anything else from the government?

2 MR. CHUNG: No, your Honor.

3 THE COURT: I would ask Mr. Brancaccio, respectfully,  
4 to please stand and I am going to impose the sentence.

5 Having considered the factors at 18 United States Code  
6 Section 3553(a), it is my judgment that you be committed to the  
7 custody of the Bureau of Prisons to be imprisoned for a term of  
8 165 months followed by three years of supervised release,  
9 including the mandatory and special conditions that I mentioned  
10 before and incorporate here by reference. I'm not imposing a  
11 fine. I'm not imposing restitution for the reasons mentioned.  
12 I am imposing a \$100 special assessment which is due  
13 immediately.

14 As for the reasons for this sentence, I think I have  
15 tried to articulate them as best I can throughout today's  
16 sentencing proceeding and I incorporate that entire discussion  
17 here by reference.

18 Does either counsel know of any legal reason, starting  
19 with the government, why the sentence should not be imposed as  
20 so stated?

21 MR. CHUNG: No, your Honor.

22 MR. RAY: No, your Honor.

23 THE COURT: I hereby order the sentence to be imposed  
24 as so stated.

25 Mr. Brancaccio, to the extent that you have not

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1 already waived your appeal rights, now I'm talking about the  
2 plea agreement dated April 25, 2012, which does in fact include  
3 a series of waivers of appeal rights, specifically it says that  
4 you would not file a direct appeal, you waive the right to file  
5 a direct appeal. You also waive the right to bring what's  
6 called a collateral challenge, including, but not limited to,  
7 applications under 28 United States Code Sections 2255 and  
8 2241. And it also includes a waiver of your right to seek a  
9 sentence modification pursuant to 18 U.S.C. Section 3582(c) of  
10 any sentence that's within or below the stipulated guideline  
11 range of 210 to 240 months. Of course, this sentence is  
12 significantly below that guideline range and so these waivers  
13 of appeal apply. But to the extent that there may be some  
14 other right remaining to appeal, I notify you that you have  
15 that right to appeal. If you are unable to pay the cost of an  
16 appeal, you have the right to apply for leave to appeal in  
17 forma pauperis. If you request, the clerk of the Court will  
18 prepare and file a notice of appeal on your behalf immediately.

19 Do you understand those appeal rights?

20 THE DEFENDANT: Yes, sir. I'd like to do so. I would  
21 like to put in an appeal. Anything that I can do.

22 THE COURT: You can discuss that with Mr. Ray. There  
23 are, as I say, these waivers of appeal that you have agreed to,  
24 but you can discuss with Mr. Ray the issues about appeal.

25 MR. RAY: I should note for the record that I believe,

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1 speaking as a lawyer, and Mr. Brancaccio's lawyer, that those  
2 waiver provisions do apply. But, of course, nothing prevents  
3 Mr. Brancaccio, if he chooses, to file a notice of appeal. We  
4 will deal with the consequences of that later on.

5 The record should reflect the fact that I have advised  
6 him that those waivers do in fact apply, and I agree with the  
7 Court that the sentence imposed today is below the stipulated  
8 guidelines range and that's the reason why it applies.

9 THE COURT: Does the government have any open counts  
10 or matters it wants to resolve?

11 MR. CHUNG: Yes, your Honor. The government moves to  
12 dismiss all open counts against the defendant in this case.

13 THE COURT: I'll grant that application.

14 Starting with the government, did you want to add  
15 anything to today's proceeding?

16 MR. CHUNG: No, your Honor.

17 THE COURT: How about the defense?

18 MR. RAY: No, your Honor.

19 THE DEFENDANT: No, sir.

20 THE COURT: I think that concludes our work for today.

21 Mr. Brancaccio, I wish you the best of luck going  
22 forward. Thanks very much.

23 o0o  
24  
25